IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs November 29, 2007

FRANK T. DALTON v. LORIANN DEUEL

Appeal from the Juvenile Court for Rutherford County
No. TC407 Donna Scott Davenport, Judge

No. M2007-01093-COA-R3-JV - Filed January 28, 2008

A mother appeals from an order of the Juvenile Court of Rutherford County dismissing or denying the mother's second motion to vacate an order of that court domesticating an order of the Family Court of Rensselaer County, New York, which awarded custody of the mother's ten year old daughter to the girl's putative father, a resident of New York State. The motion to vacate, which was dismissed in the order that is the subject of this appeal, was filed approximately eighteen months after the order of domestication, and the domestication order was not appealed. The mother's motion to vacate the trial court's order was untimely filed and the mother has not established any other procedural basis upon which the domestication order could be set aside. Accordingly, we affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Juvenile Court Affirmed

PATRICIA J. COTTRELL, J., delivered the opinion of the court, in which FRANK G. CLEMENT, JR., and ANDY D. BENNETT, JJ., joined.

Loriann Deuel, Eagleville, Tennessee, Pro Se.

Frank Dalton, Rensselaer, New York, Pro Se.

OPINION

I. BACKGROUND

The child at the center of this case, B.M.D., was born out of wedlock in Murfreesboro, Tennessee, in December of 1993, to Loriann Deuel, the appellant mother. The space on Britney's birth certificate for the father's name was left blank. Apparently, the mother and the child had only a few contacts with the child's putative father, appellee Frank Dalton, over the next eight years, but at some point in time Mr. Dalton was ordered to pay support for the child. From at least the time of the child's birth and continuing throughout the proceedings herein, Mr. Dalton has resided in Rensselaer County, New York.

Around August of 2001, the mother moved to New York with the child "to visit a terminally ill relative" and, apparently, resided in the same general area as Mr. Dalton. She and the child remained for approximately one year. According to the mother's pleadings, Mr. Dalton visited with her and/or the child during this time.

II. PROCEEDINGS IN NEW YORK STATE

On May 7, 2002, Mr. Dalton filed a petition in the Family Court of Rensselaer County, asking for specified, regular visitation with Britney.[1] The initial order granting visitation is not found in the record, but subsequent petitions and orders reference "the Visitation Order of the Court dated July 18, 2002." They also reference the appointment of an attorney named Philip J. Danaher as "Law Guardian," a position under New York law which apparently corresponds to that of a Guardian ad Litem.

The proceedings in New York continued, and, according to the mother's filings and brief, both parties made some further filings.[2] The mother left New York with the child and returned to Rutherford County, Tennessee, approximately a year after moving to New York and after the proceedings in the New York court had begun. The proceedings in the New York court resulted in the order that is the subject of the mother's arguments.[3] That order, dated January 29, 2003, bears the caption "In the Matter of a Custody/Visitation Proceeding." The order recited that the court had been advised that the mother had fled the state with the child and relocated to Murfreesboro, Tennessee, that Mr. Dalton had made application for custody and Habeas Corpus of the child, and that the Law Guardian had supported the application. The court's order concluded:

> ORDERED, That custody of said child is hereby awarded to her father, Frank T. Dalton, and it is further;
>
> ORDERED, That any and all law enforcement personnel as well as applicable State and local agencies and officials are hereby directed pursuant to Interstate Compact to assist, pursuant to the Habeas Corpus application of Frank T. Dalton, father, in taking the child in question into protective custody and returning such child to her father, Frank T. Dalton, in the County of Rensselaer and State of New York.

---

[1] The mother states that she received notice of the hearing on that petition, but did not attend.

[2] While some documents from the New York proceedings appear in the "file" furnished to this court, those documents were filed by the mother in the Rutherford County Juvenile Court long after any proceedings in that court were over and final. Consequently, we must presume that those documents were not before the trial court or considered by it in making the ruling appealed herein. They are not actually part of the "record" in this appeal. Therefore, this court cannot rely upon them in our resolution of this appeal. We mention only a few details from those filings in order to provide a background or context for the issues in this appeal.

[3] According to the documents filed by the mother, Mr. Dalton filed a petition in the Family Court of Rensselaer County in August 5, 2002, asserting that the mother had violated its visitation order. A hearing was conducted in the Family Court on December 23, 2002, with Mr. Dalton and Mr. Danaher in attendance.

III. PROCEEDINGS IN TENNESSEE

A. THE PETITION TO DOMESTICATE

Acting through his attorneys, Frank Dalton filed a "Petition to Domesticate a Foreign Order Regarding Custody and Visitation" on May 30, 2003, in the Juvenile Court of Rutherford County. Attached to the Petition was a certified copy of the January 29, 2003 order of the Family Court of Rensselaer County referenced above.

The mother, acting *pro se*, filed an answer to that petition. She argued that the court should not grant Mr. Dalton's petition because she was entitled to notice of the proceedings in the Rensselaer County Court pursuant to Tenn. Code Ann. § 36-6-229(d)(3), part of the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), but that she did not receive such notice. In the absence of such notice, she argued, the New York court's order was invalid. She further claimed that she was not aware at any time that Mr. Dalton had applied for custody of the child.

On October 17, 2003, the Juvenile Court conducted a hearing on Mr. Dalton's petition. There is no transcript of that hearing in the appellate record. The trial court granted Mr. Dalton's petition in an order that was entered on October 24, 2003. The court's order declared that the order of the Rensselaer County, New York court "is entitled to full faith and credit under Article IV § 1 of the Constitution of the United States of America and the Order is hereby made the Order of this Court in every particular." The court went on to state that "the pleadings filed by the Respondent must be addressed to the Family Court of Rensselaer County, New York." The mother did not file a timely post-judgment motion or an appeal of the Juvenile Court's order, and it became final in thirty days. *See* Tenn. R. Juv. P. 1(b); Tenn. R. Civ. P. 59. Neither did she follow the Tennessee court's instruction and seek relief in the courts of New York.

Several months after the domestication order was entered, on February 23, 2004, Mr. Dalton and deputies from the Rutherford County Sheriff's Department, armed with a child custody attachment writ, took the child into custody. She was immediately turned her over to Mr. Dalton, who took her back to New York.

B. THE MOTIONS TO VACATE

After her child was taken from her custody, the mother filed a motion in the Rutherford County Juvenile Court to return her child and to vacate its domestication order. The motion, dated March 18, 2004, repeated the same arguments the mother had first presented in her answer to Mr. Dalton's petition,[4] essentially challenging the validity of the New York court's custody order.

After a hearing on the mother's motion, the trial court entered an order of dismissal on May 11, 2004. The court once again cited Article IV, Section One of the United States Constitution as

[4]She additionally claimed that Mr. Dalton had imposed a fraud on the Rensselaer County Court by falsely claiming that he and she had formerly been married. She also claimed that Mr. Dalton had a criminal history.

requiring it to give full faith and credit to the order of the Family Court of Rensselaer County. The court also held that since the mother's motion was filed more than thirty days after the entry of its order of October 28, 2003, that order had become final and could not be set aside. No appeal was taken from this order.

Instead, almost a year later, on April 5, 2005, the mother filed another motion, which she styled as a "Motion to Vacate, Motion to Renew, Motion to Expunge." She claimed that she had discovered another legal reason that the order of the Rensselaer County Family Court order was jurisdictionally void. She noted that under the Parental Kidnapping Prevention Act ("PKPA"), 28 U.S.C. § 1738A(e), a custody determination is entitled to full faith and credit in another state only if there has been notice and an opportunity to be heard, and she repeated her allegation that she had been afforded neither in the New York proceeding. The mother also argued that some of the procedures followed by the Rensselaer County Court violated the laws of New York State.

After a hearing, the trial court entered an order denying the motion on May 19, 2005, reiterating its previous ruling as to the effect of the full faith and credit clause and noting that the mother's motion was filed more than thirty days after the entry of its order of May 11, 2004, which dismissed her earlier motion to vacate. The mother then appealed the Juvenile Court's order to the Circuit Court of Rutherford County, which dismissed the appeal for lack of jurisdiction. She appealed that order to this court, which ruled that the Circuit Court should have transferred her appeal to the Court of Appeals, rather than dismissing it. *See Dalton v. Deuel*, No M2005-02399-COA-R3-CV (Tenn. Ct. App. Apr. 27, 2007). The mother's appeal is now properly before us.

IV. THE ISSUES AND RECORD ON APPEAL

The mother's arguments on appeal are addressed to the validity of the October 24, 2003 order domesticating the New York custody order on the basis that the underlying order of the New York courts is void or invalid. However, the domestication order is not the order under appeal. This court's jurisdiction on appeal is limited to review of the only trial court order from which an appeal was timely taken.

The Tennessee Rules of Appellate Procedure give a party dissatisfied by the judgment of a trial court thirty days after the date of entry of the judgment appealed from in which to file a notice of appeal. Tenn. R. App. P. 4(a). This court does not have the authority to extend the time for filing the notice of appeal beyond the thirty day period. Tenn. R. App. P. 2. The time limit of 4(a) Tenn. R. App. P. serves the purpose of promoting finality of judgments and avoiding the possibility of endless litigation in which nothing is ever finally decided. *Whitaker v. Whirlpool Corporation*, 32 S.W.3d 222, 231 (Tenn. Ct. App. 2000).

The juvenile court's order of domestication was entered on October 24, 2003. Since the mother did not file a timely notice of appeal of that order, that order is not before this court in this appeal. The same reasoning applies to the trial court's order of May 11, 2004, which dismissed the mother's first motion to set aside the order of domestication. Consequently, the only order appealed is the trial court's order denying the mother's second motion to vacate.

Additionally, our review is limited to the record before us, and we can only consider matters properly included in that record. The mother's brief includes a number of factual allegations that, although they might be helpful in understanding the background story if they had been proved, simply do not appear in the record and, therefore, cannot be relied upon by this court. There are also a number of documents that the mother filed with the Juvenile Court of Rutherford County that cannot properly be considered part of the record because they were filed long after the orders of that court had become final and could not have been considered by the trial court in making the ruling that is the subject of this appeal.[5]

We are also limited as to any relief we are authorized to grant. The mother is requesting that the trial court and/or this court order that custody be returned to her. Even if this court were able to reach the merits of the domestication order, and even if we were to vacate that order, our decision would not result in the return of the child to the mother's custody in Tennessee. The father has physical custody of the child in New York pursuant to a custody order issued by the New York courts. As the trial court in Tennessee advised the mother initially, any relief from the New York order must come from the New York courts.

V. DENIAL OF MOTION TO VACATE

As explained above, the only order that we may consider in this appeal is the trial court's order of May 19, 2005, denying the mother's motion to vacate, renew or expunge its previous orders. There are obvious problems, however, with seeking to vacate an order which is no longer directly appealable because it has become final. Serial filings of such motions have the effect of undermining the finality that the time limit of Tenn. R. App. P. 4(a) is designed to promote.

A litigant may seek modification, including the setting aside, of a final order by complying with Rule 59 of the Tennessee Rules of Civil Procedure, which allows a post-trial motion to alter or amend. However, such a motion must be filed within thirty (30) days of the order sought to be altered or amended. The Mother's motion to vacate in the case before us did not comply with that requirement. Thus, we cannot review her motion under the standards applicable to Rule 59. We agree with the trial court that, when considered as a motion to alter or amend the domestication order by setting it aside, the mother's second motion to vacate was not timely under Rule 59. As the trial court stated, the order that was the subject of the motion had long ago become final.

The only procedural avenue available to the mother at the time she filed her second motion to vacate through which a court could set aside the trial court's order domesticating the New York court's custody order is found in Rule 60 of the Tennessee Rules of Civil Procedure. Under Rule 60.02, a court is allowed, "on motion or upon such terms as are just," to relieve a party from a final judgment, order or proceeding for a limited number of possible reasons which are set out in the rule. Even though the mother herein did not rely on that rule or name her motion in accordance with that

[5]The mother has apparently proceeded without the assistance of counsel throughout these proceedings. She appears pro se in this appeal. Although represented by counsel in earlier stages of this litigation in the trial court, the father has also filed a pro se brief in this appeal.

rule, we will nonetheless analyze her motion in light of the requirements for relief under Tenn. R. Civ. P. 60.

Relief under Rule 60.02 is considered "an exceptional remedy" and not a routine one. *Nails v. Aetna Ins. Co.*, 834 S.W.2d 275, 294 (Tenn. 1992); *Fielder v. Lakesite Enterprises Corp.*, 871 S.W.2d 157, 159 (Tenn. Ct. App. 1993). The purpose of Rule 60 is to alleviate the effect of an oppressive or onerous final judgment, while also balancing the competing interests of justice and finality. *Whitaker v. Whirlpool Corp*., 32 S.W.3d 222, 231 (Tenn. Ct. App. 2000). "Rule 60.02 acts as an escape valve from possible inequity that might otherwise arise from the unrelenting principal of finality embedded in our procedural rules." *Thompson v. Firemen's Fund Insurance Co.*, 798 S.W.2d 235, 238 (Tenn. 1990). While the rule is designed to allow the trial court to balance the competing interests of justice and finality, "[b]ecause of the importance of this 'principle of finality,' the 'escape valve' should not be easily opened." *Banks v. Dement Constr. Co., Inc*., 817 S.W.2d 16, 18 (Tenn. 1991) (quoting *Toney v. Mueller Co.*, 810 S.W.2d 145, 146 (Tenn. 1991).

Rule 60.02 reads in relevant part:

> On motion and upon such terms as are just, the court may relieve a party or the party's legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (3) the judgment is void; (4) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that a judgment should have prospective application; or (5) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1) and (2) not more than one year after the judgment, order or proceeding was entered or taken.

The party seeking relief has the burden of showing grounds therefor; he or she must show that he is entitled to relief. *Spruce v. Spruce*, 2 S.W.3d 192, 194 (Tenn. Ct. App. 1999); *Howard v. Howard*, 991 S.W.2d 251, 255 (Tenn. Ct. App. 1999); *Davidson v. Davidson*, 916 S.W.2d 918, 923 (Tenn. Ct. App. 1995). Further, although Rule 60.02 gives the courts broad authority, "this power 'is not to be used to relieve a party from free, calculated and deliberate choices it has made.'" *Federated Insurance Company v. Lethcoe,* 18 S.W.3d 621, 625 (Tenn. 2000) (quoting *Banks v. Dement Construction Co.*, 817 S.W.2d 16, 19 (Tenn. 1991)). *See also Cain v. Macklin*, 663 S.W.2d 794, 796 (Tenn. 1984); *Magnavox Company of Tennessee v. Boles & Hite Construction Co.*, 583 S.W.2d 611, 613 (Tenn. Ct. App. 1979).

Whether to grant relief pursuant to Rule 60.02 is a matter within the trial court's discretion, and the trial court's decision will be reversed only for abuse of that discretion. *Lethcoe*, 18 S.W.3d at 624; *Underwood v. Zurich Insurance Co.*, 854 S.W.2d 94, 97 (Tenn. 1993);*Toney,* 810 S.W.2d at 147; *Ellison v. Alley*, 902 S.W.2d 415, 418 (Tenn. Ct. App. 1995). Under the abuse of discretion standard, a trial court's ruling "will be upheld so long as reasonable minds can disagree as to

propriety of the decision made." *State v. Gilliland*, 22 S.W.3d 266, 273 (Tenn. 2000) (citing *Overstreet v. Shoney's Inc.,* 4 S.W.3d 694, 709 (Tenn. Ct. App. 1999)).

A motion under Rule 60.02 must be made, "within a reasonable time," and if the motion is based on specified allegations, within one year after the entry of the order from which relief is requested. In the present case the mother's motion was essentially directed against the order of domestication which was entered almost a year and a half earlier, and so she could not have relied on the grounds of mistake, inadvertence, surprise, excusable neglect or fraud.

Considering the arguments in the mother's brief, it is clear that the only potentially applicable ground in Rule 60.02 is the third, *i.e*., that the judgment from which relief is sought is void.[6] The mother has, from the initiation of the domestication proceedings through her brief in this appeal of the denial of her second motion to vacate, contended that she did not receive notice of the custody hearing in the New York court and, because of that lack of notice, the New York order was invalid and not entitled to enforcement in the courts of this state based on provisions of the UCCJEA, Tenn. Code Ann. § 36-6-211, the PKPA, 28 U.S.C. 1738A(e), and other legal grounds. Setting aside the question of whether the second motion to vacate, which is the subject of this appeal, was filed within a reasonable time, we conclude that the mother's motion does not meet the standard for setting aside the domestication order for voidness.

The standard for determining whether a judgment is void is well settled: whether the court had general jurisdiction of the subject matter, whether the judgment was wholly outside the pleadings, and whether the court had jurisdiction of the parties. *Gentry v. Gentry*, 924 S.W.2d 678, 680-81 (Tenn. 1996). Absent *prima facie* voidness, generally where one of the enumerated deficiencies appears on the fact of the order, an order is merely voidable or it is valid. In *Gentry*, the Court found that absent such a *prima facie* void decree, "a flaw in procedure" would not render a decree void. *Id*. 924 S.W.2d at 681.

The test for a void order has also been stated as that it appears on the face of the order itself to have been rendered without jurisdiction over the parties, the subject matter, or the relief given *New York Casualty Co. v. Lawson*, 24 S.W.2d 881, 883 (Tenn. 1930). *See* also *State v. Bomar*, 354 S.W.2d 763, 765 (Tenn. 1962); *Guinn v. Guinn*, No. W1999-01809-COA-R3-CV, 2001 WL 359243 at *4 (Tenn. Ct. App. April 6, 2001) (no Tenn. R. App. P. 11 perm app. filed).

---

[6]The allegations in the motion do not qualify it for consideration under the fifth ground, "any other reason justifying relief from the operation of the judgment. The mother has not alleged a change in the law or in the parties' circumstances that would make the continuation of the judgment inequitable. Even where such a change has occurred, Rule 60.02 is not meant to be used in every case in which the circumstances of a party change after the entry of a judgment or order. *Underwood*, 854 S.W.2d at 97; *Killian v. Tenn. Dept. of Human Services*, 845 S.W.2d 212, 213 (Tenn. 1992). That is because, despite its broad language, Tennessee courts have very narrowly construed Tenn. R. Civ. P. 60.02(5). *Federated Ins. Co. v. Lethcoe*, 18 S.W.3d at 625; *Underwood*, 854 S.W.2d at 97; *Henderson v. Kirby*, 994 S.W.2d 602 (Tenn. Ct. App. 1996). The standards of Rule 60.02(5) are more demanding than those applicable to the other grounds for relief under the rule. *MCNB Nat'l Bank of N.C. v. Thrailkill*, 856 S.W.2d 150, 154 (Tenn. Ct. App. 1993). Relief under Rule 60.02(5) is only appropriate in cases involving extraordinary circumstances, extreme hardship, or a reason of "overriding importance." *Lethcoe*, 18 S.W.3d at 624 (citing *Underwood* , 854 S.W.2d at 97); *Banks*, 817 S.W.2d at 19.

> A void judgment is one which shows upon the face of the record a want of jurisdiction in the court assuming to render the judgment, which want of jurisdiction may be either of the person, or of the subject-matter generally, or of the particular question attempted to be decided or the relief assumed to be given.

Lawson, 24 S.W.2d at 883.

In the case before us, it is clear that the Juvenile Court of Rutherford County had general subject matter jurisdiction over proceedings to domesticate an order dealing with the custody of a minor child; both parties appeared in the proceedings, subjecting themselves to the jurisdiction of the court; and the order domesticating the New York order was within the pleadings, that relief having been the purpose of the proceeding. Consequently, the order of the Juvenile Court of Rutherford County is not void.

Further, there was nothing on the face of the judgment of the Family Court of Rensselaer County to show that it lacked jurisdiction over the parties or the subject matter. Even though the mother asserts she never received notice of the hearing that resulted in the custody order, no irregularity in the order or the proceedings appears on its face. The mother and the child were residing in New York when Mr. Dalton initiated the proceedings, and the mother admits that she filed a pleading in those proceedings. The fact that the mother had left New York by the time of the custody hearing an order does not deprive the New York court of jurisdiction under the UCCJEA.

In sum, even if, *arguendo*, we deemed the mother's motion to vacate to be a Rule 60 motion, we would still have to conclude that the trial court did not abuse its discretion in declining to give her the relief she sought. No other basis exists for vacating the domestication order.

VI.

The judgment of the trial court is affirmed. Remand this case to the Juvenile Court of Rutherford County for any further proceedings necessary. Tax the costs on appeal to the appellant, Loriann Deuel.

_____

PATRICIA J. COTTRELL, JUDGE